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No. 86-1900

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LEONARD PELTIER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF AMICUS CURIAE MEMBERS OF CONGRESS IN SUPPORT OF LEONARD PELTIER'S PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTEREST OF THE AMICUS CURIAE

This pleading is submitted by the undersigned, an ad hoc group of Members of Congress of the United States as amicus curiae in support of Leonard Peltier's Petition for Certiorari to the United States Court of Appeals for the Eighth Circuit. This brief is filed with the consent of all parties as evidenced by letters from each party which are being submitted with the brief.

Many of us sit on Committees and Subcommittees involved with the judiciary, criminal justice, individual rights and liberties, and Indian affairs. As a group, we do not formally represent any particular Committee or Subcommittee of Congress and do not speak for or on behalf of any political

party. We are unified, however, by our deep concern over the District Court's denial of Mr. Peltier's request for a new trial, and the affirmance of such denial by the Eighth Circuit, which in its opinion omitted entirely from mention the important issues raised in our amicus brief before that Court.

We believe that the denial of Mr. Peltier's request for a new trial under the facts and circumstances of this case constitutes a violation of his constitutional rights and ignores the intent of Congress in its passage of the Jencks Act, Title 18 U.S.C. 3500.

As Members of Congress, we submit it is in the public interest that a new trial be granted.

ISSUE PRESENTED

Where the government violates the Jencks Act, by failing to turn over to the defense numerous documents directly impeaching its firearms expert regarding his testimony on the most critical evidentiary question in the case, and where such violations remained hidden until after the expiration of all of petitioner's direct appeals, should petitioner be entitled to a new trial?

STATEMENT OF THE CASE

American Indian activist Leonard Peltier was found guilty by a jury on April 18, 1977 of two counts of first degree murder in violation of 18 U.S.C. 2, 1111, and 1114 for his alleged participation in the murder of two FBI agents on the Pine Ridge Indian Reservation in South Dakota. He was sentenced to two consecutive life terms. This Court affirmed the judgment of conviction on direct appeal. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979).

On April 20, 1982 the petitioner filed a motion to vacate the judgment and for a new trial pursuant to 28 U.S.C. 2255. He thereafter filed a supplement to that motion based on newly discovered evidence on December 15, 1982. Both post-trial motions were

denied by the District Court on December 30, 1982 without an evidentiary hearing. United States v. Peltier, 553 F.Supp. 890 (D.N.D. 1982). On appeal from that ruling, Peltier's principal contention was that the District Court erred in denying him an evidentiary hearing in which he could attempt to prove his substantive claims. Fifty Members of Congress, including many of the undersigned, filed an amicus brief in support of Mr. Peltier's request for an evidentiary hearing based on the Congressional intent underlying 28 U.S.C. 2255 and on the public's interest in having a full record made of Mr. Peltier's allegations of governmental abuse.

After oral argument, this Court remanded the case for an evidentiary hearing to consider testimony and/or documentary evidence relevant to the

meaning of an October 2, 1975 FBI teletype relating to the crucial ballistics evidence introduced at Mr. Peltier's trial. That hearing commenced on October 1, 1984, and the District Court ruled on May 22, 1985 that Mr. Peltier did not prove that the nondisclosure of the ballistics-related evidence violated the doctrine of Brady v. Maryland, 373 U.S. 83 (1963). Despite the fact that Mr. Peltier had raised the issue that the government committed extensive Jencks Act violations which deprived him of a fair trial, the District Court declined to address the merits of the alleged Jencks Act violations.

Petitioner thereafter appealed to the Court below. Fifty-five Members of Congress, as amicus curiae, filed a brief on his behalf, urging the court to grant Mr. Peltier a new trial on the

grounds that the government's violation of the Jencks Act had deprived him of a fair trial. The Court of Appeals for the Eighth Circuit affirmed the District Court, but never addressed the Jencks issue. Mr. Peltier thereafter filed successive petitions for reconsideration and for rehearing en banc which were denied.

STATEMENT OF FACTS

FBI Agents Jack Coler and Ronald Williams were killed during a firefight on the Pine Ridge Indian Reservation on June 26, 1975 by high velocity, small caliber bullets fired at close range. The casing of a .223 caliber bullet, characteristic of that fired by the murder weapon, was found in the trunk of Agent Coler's car. The casing was allegedly ejected into the open trunk of that vehicle at the time of the shooting. The critical evidence tying Mr. Peltier to the killing of the two agents consisted of testimony by FBI firearms examiner Evan Hodge that the aforementioned casing from the car trunk had been loaded into and extracted from an AR-15 rifle recovered in Wichita, Kansas on September 10, 1975 and of independent evidence linking Peltier to the possession of that rifle on the day

of the murders.

The Court of Appeals for the Eighth Circuit states in its earlier opinion in this case, "the importance of the bullet casing to the government's case against Peltier cannot be ignored." United States v. Peltier, 731 F.2d 550, 552 (8th Cir. 1984). During argument to the jury at the close of trial, the prosecutor called the shell casing "perhaps the most important piece of evidence in this case." Id. And, on direct appeal, the Court of Appeals noted that "[T]he .223 caliber cartridge casing allegedly found in the trunk of Coler's car was critical evidence against Peltier." 585 F.2d at 329.

Documents obtained by Mr. Peltier in a post-conviction Freedom of Information Act ("FOIA") suit and from the government in preparation for the October 11, 1984 evidentiary hearing,

however, cast serious doubt on the reliability of the ballistics evidence used to convict the petitioner. It is this important newly discovered evidence, the government's failure to disclose it to Mr. Peltier before or during trial, and the failure of the courts below to remedy this gross Jencks Act violation, which prompts the concern of the amicus curiae, and their present support for a new trial.

As discussed by the Court of Appeals in its 1984 opinion, one teletype uncovered in the FOIA action could discredit Hodge's analysis of the firing pin. At trial, the firearms examiner testified that there are generally two examinations available for comparing a casing against a rifle: a firing pin impression test, based on analysis of the dent at the butt of the casing made when the trigger is pulled;

and an extractor mark test, based on scratches incurred when the spent casing is expelled. According to Hodge, the firing pin test is conclusive, while the extractor test is significantly less reliable. Trial TR. 3248. He further stated at trial that a firing pin comparison was not possible in this instance because of "a lack of marks on the bolt face and the condition in which I received it."

An October 2, 1975 teletype authored by Hodge states, however, that the AR-15 rifle recovered in Wichita "CONTAINS DIFFERENT FIRING PIN THAN THAT IN RIFLE USED AT RESMURS [reservation murders] SCENE." Peltier alleged in his motion for a new trial that this teletype indicated that the bullet casings found at the scene of the crime, including the casing found in Coler's trunk, had been tested against the

Wichita AR-15 with negative exculpatory results. As the court below noted, such tests would have discredited Hodge's testimony, and ". . . would seriously have undermined the inference that the gun in fact fired the fatal bullets which the government urged the jury to draw from the positive extractor mark testimony given by Hodge." Peltier, 731 F.2d at 553.

In response to the motion for a new trial, the government contended that this October 2nd teletype and an October 31, 1975 lab report admitted into evidence at trial (stating that "none of the other ammunition components recovered at the Resmurs scene could be associated with [the 3 AR-15 rifles, including the one associated with Leonard Peltier]") only referred to 7 out of the one hundred thirty-seven .223 caliber casings recovered from that

location in July, 1975. Hodge testified at the evidentiary hearing that the October 2 and October 31 transmissions referred only to the seven .223 casings he had already tested; he did not examine the casings tying the Wichita AR-15 to the murder scene, including the casing recovered from Agent Coler's car, until December 1975 or January 1976, and he noted the results of those tests in his January 13, 1976 and February 10, 1986 lab reports. The October transmissions did not, according to Hodge, contradict his testimony at trial connecting the Resmurs casings with the Wichita AR-15.

However, other documents, revealed by the government for the first time after the District Court ordered discovery on August 31, 1984 in preparation for the evidentiary hearing, well after the trial, contained

additional statements by Hodge which critically undermined his assertion that he did not examine the shell casings until January or February. In Exhibit 34, an October 3, 1975 memorandum from Hodge to the Director of the Bureau of Alcohol, Tobacco & Firearms ("BATF"), Hodge stated that he had received four weapons from the Wichita office of BATF (including the AR-15) in connection with the reservation murders; that he believed a .308 caliber Remington model 760 carbine to have been Special Agent Coler's rifle and to have been present at the crime scene; that he requested ". . . permanent custody of this weapon be turned over to this Bureau to aid in successful prosecution of the individuals involved in the murders of [the agents]"; and that he was returning the other weapons to the custody of BATF. In a teletype to the FBI's Kansas

City office on November 5, 1975, Hodge confirmed that he had returned the Wichita AR-15, identified with the FBI identification number "K40", to BATF on October 3, 1975. The clear import of the October 3rd memorandum was that the FBI would retain the Remington carbine because it was recovered from the crime scene and that the FBI was returning the other weapons, including the AR-15 from Wichita, because they were not involved in the murders.

On November 17, 1975, Hodge received a teletype (evidentiary hearing Exhibit 23) requesting a priority examination of an AR-15 rifle sent from Portland, Oregon because "AN AR-15 AND A RUGER .44 MAGNUM HAVE BEEN USED BY BUREAU FUGITIVE LEONARD PELTIER DURING PERTINENT RESMURS PERIOD AND THAT AR-15 MAY BE ACTUAL WEAPON UTILIZED BY HIM TO KILL SA COLER AND WILLIAMS." App. 1388.

Hodge responded in a teletype dated November 24, 1975, that: "CARTRIDGE CASES FIRED IN SUBMITTED WEAPONS IN LABORATORY WERE COMPARED WITH LIKE CALIBER CARTRIDGE CASES RECOVERED AT RESMURS SCENE AND IT WAS CONCLUDED THAT THESE TWO RIFLES, IN THEIR PRESENT CONDITIONS, COULD NOT HAVE FIRED ANY OF THE RECOVERED SPECIMENS." App. 1387. The meaning of this November 24 teletype is consistent with the October 2 teletype, the October 3 memorandum, and the October 31 lab report: Agent Hodge compared each AR-15 submitted to him with all of the .223 casings recovered from the Resmurs scene, and had determined the Wichita and Portland rifles were not used in the killings of the agents.

The Rapid City FBI office's interpretation of these results is consistent with such a conclusion. An

October 2, 1975 teletype from that office to Hodge's lab in Washington (evidentiary hearing Exhibit 6) stated: "referenced BuTel., October 2, 1975, INDICATED .223 CASINGS NOT IDENTIFIABLE WITH AR- 15 RIFLE LOCATED IN VEHICLE WHICH EXPLODED ON KANSAS TURNPIKE, (the Wichita rifle) SEPTEMBER 10, 1975. LAB REQUESTED TO COMPARE ALL .223 CASINGS WITH AR-15 LOCATED AL RUNNING'S PROPERTY SEPTEMBER 11, 1975 . . .". Hodge, despite the fact that he never contradicted Rapid City's interpretation of his findings, nevertheless identified the Wichita AR-15 at trial as the weapon which ejected the .223 casing found in Agent Coler's car trunk.

Moreover, numerous other written statements of Hodge and exculpatory materials as set forth in the pleadings below were suppressed by the government at the appellant's trial.

ARGUMENT SUMMARY

The government, in prosecuting Mr. Peltier, engaged in violation of the Jencks Act, 18 U.S.C. 3500, by suppressing numerous documents which constituted Jencks Act witness statements. A number of these were statements of the government's firearms expert, Evan Hodge. At the trial, Hodge provided testimony linking a shell casing found in the trunk of one of the victims' car with a rifle possessed by the defendant. This evidence was the linchpin of the government's case. Only after the trial, and well after the expiration of Mr. Peltier's direct appeals, were these written Jencks Act statements of Hodge discovered. Several of them impeach his critical trial testimony.

The concealment of the aforesaid documents by the government deprived the

petitioner of a fair trial, amounted to a fundamental defect in the criminal proceedings, undermines all confidence in the outcome of the trial, and caused a miscarriage of justice. Consequently, Mr. Peltier should be granted a new trial.

ARGUMENT

The Jencks Act, 18 U.S.C. 3500, governs the disclosure during a federal criminal trial of statements or reports a previously made by government witnesses. Subpart (b) states in relevant part that:

> "after a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The Act codified disclosure

mandated by the Supreme Court in Jencks v. United States, 353 U.S. 657 (1957), and "reaffirmed (Jencks) in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the government touching the events and activities as to which a government witness has testified at

trial." Goldberg v. United States, 425 U.S. 94, 104 (1976); see also S.Rep. No. 981, 85th Cong., 1st Sess., 3 (1957); H.R.Rep. No. 700, 85th Cong., 1st Sess., 4 (1957).

The purpose of requiring production of a witness' prior statements is to permit the defense, and therefore the jury, to learn whether the witness has previously made statements which are inconsistent with or cast doubt on his sworn statements at trial and to thus evaluate the credibility of testimony which could well be used to determine the defendant's life or liberty:

> Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon

> the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks, 353 U.S. at 667. The value or utility of the material for impeachment or other legitimate purposes is therefore not subject to approval by the trial court prior to disclosure: "the determination of what may be useful to the defense can properly and effectively be made only by an advocate." Dennis v. United States, 384 U.S. 855, 874-5 (1966); see Lewis v. United States, 340 F.2d 678, 682 (8th Cir. 1965) ("[I]t is no part of the trial court's function to speculate as to whether or not an otherwise producible statement under the Jencks Act will be of any use to the defendant for impeachment purposes. . . . Once producibility is established the defendant has an absolute right to the statement . . .". (citations omitted)).

Because of the strict standard of disclosure required by the Jencks Act, the government's failure to produce prior relevant statements of witnesses is excused only if the omission can be clearly shown to constitute harmless error. "Since courts cannot speculate whether (Jencks) material could have been utilized effectively at trial . . . the harmless-error doctrine must be strictly applied in Jencks Act cases." Goldberg, 426 U.S. at 111 n.21; accord, United States v. Anthony, 565 F.2d 533, 537 (8th Cir. 1977); Lewis, 340 F.2d at 684.

In the present case, the government at trial clearly violated the Jencks Act. Moreover, its violation of the statute remained hidden for years, until well after Mr. Peltier had exhausted all direct appeals. Further, its violation deprived Mr. Peltier of documents

critically impeaching the very core of the prosecution's evidence. Such gross violations of the law, producing such severe attendant consequences should not go unremedied.

Post-trial motions under 28 U.S.C. 2255 claiming violations of the laws of the United States are cognizable when the claimed error amounts to a fundamental defect depriving the defendant of a fair trial. Davis v. United States, 417 U.S. 333, 346 (1974). Where the Jencks documents, as here, directly impeach the key evidence upon which the case of the government hinged, their suppression unquestionably constitutes a fundamental defect. This Court, in United States v. Bagley, 473 U.S._____, 105 S.Ct. 3375 (1985), made clear that a violation under Brady v. Maryland requires reversal where the suppression of evidence "undermines

confidence in the outcome of the trial." Bagley, did not address Jencks Act violations. Assuming that this Court were to adopt the Bagley rule for Jencks Act violations, the suppression of critical impeachment material in this case certainly has undermined the public's confidence in the fairness of the outcome of the trial. It is respectfully suggested, however, that where prosecutors violate a federal statute such as the Jencks Act, and their violations are subsequently uncovered only after a defendant's direct appeal rights have expired, the burden on the defendant of demonstrating prejudice should not be overly onerous. In such situations, the harmless-error doctrine remains the more appropriate standard, as it has consistently been the only standard applied to Jencks Act violations. Regardless of the standard

of review that is applied, the amici contend that Mr. Peltier was deprived of a fair trial and should be granted a new one.

When the Court below first reviewed this case, it noted that there has been ". . . a clear abuse of the investigative process by the FBI." Peltier, 585 F.2d at 335 n.18. The documents concealed at trial but revealed thereafter through the appellant's FOIA action and by the government at the evidentiary hearing were clearly relevant to Hodge's credibility and to the guilt of Mr. Peltier. Hodge's prior statements (including the October 2nd teletype, the October 3rd memorandum and the November 17th teletype) were not only important for impeachment purposes but also constituted exculpatory evidence tending to exonerate the defendant. Each of

these documents indicates that Hodge had eliminated the Wichita AR-15 as the murder weapon at an early stage of the government's pre-trial investigation; the Wichita rifle was later revived as evidence, according to Mr. Peltier, only when the FBI began focusing its investigation on him for reasons unconnected with the murders. The jury never learned of them, however, because the prosecutor, in violation of the Jencks Act, never turned them over. Consequently, Mr. Peltier did not receive a fair trial.

CONCLUSION

The Jencks Act was enacted by Congress to impose an absolute requirement that the prosecution disclose at trial, upon motion, prior statements made or adopted by government trial witnesses which concern the subject matter of their testimony at trial. For, only by comparing the consistency of such prior statements with the witness' trial testimony can a judge, a jury, and a defendant properly evaluate and weigh the truth and significance of the testimony. In the instant case, Mr. Peltier made the necessary requests for disclosure, and the trial court issued pre-trial orders requiring the government to produce the materials the appellant sought. The prosecution, nonetheless, failed to disclose many of Hodge's significant prior statements and those of other

government witnesses as well - all of which cast severe doubt on the government's theory of the case. The intent of Congress, justice and the American people are not served when the government conceals documents which it is bound by law and by morality to reveal. As amici, we urge the Court to reverse the lower court's order and grant Mr. Peltier's motion for a new trial.

Respectfully submitted,

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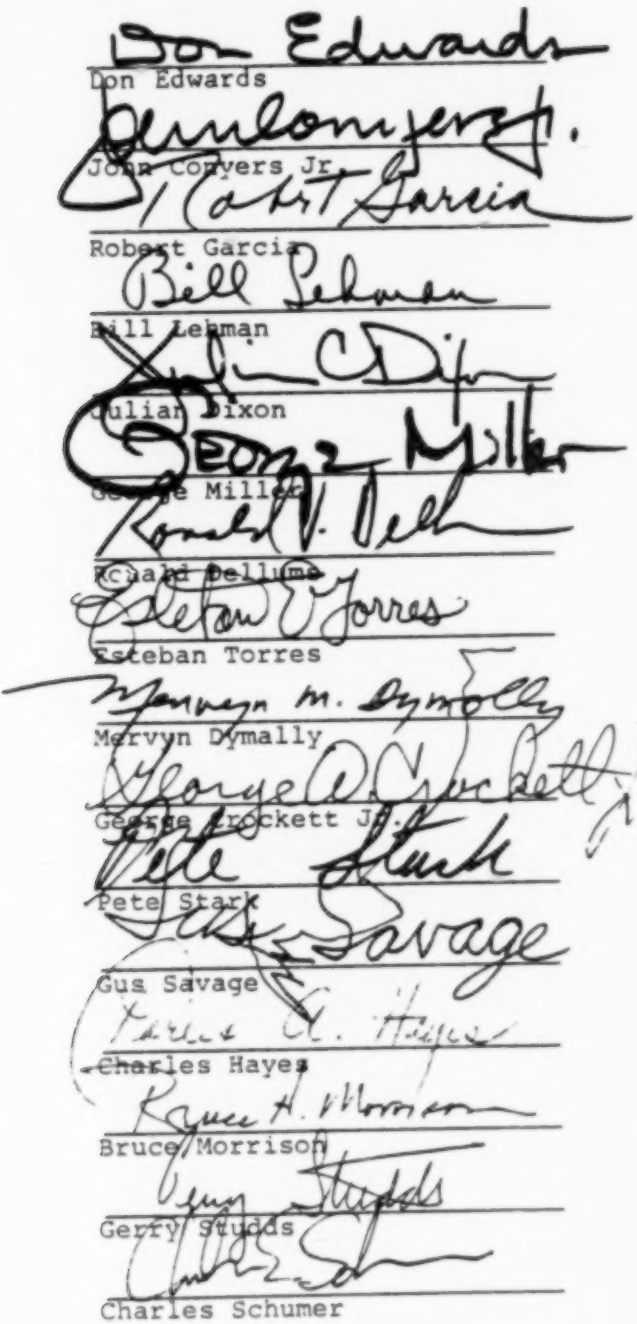

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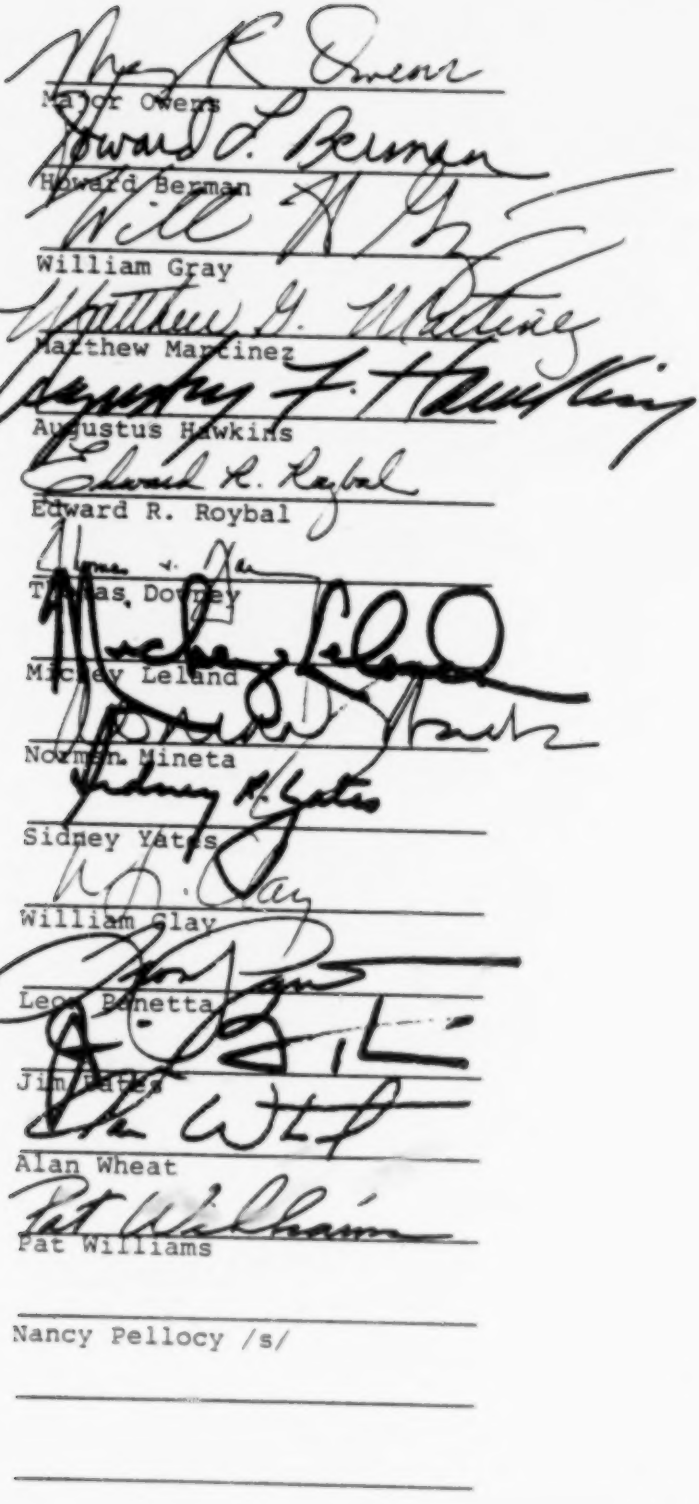

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